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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/754,347	01/05/2001	Daniel Gelber	XMP 2037	3297

30868 7590 12/17/2002

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ARLINGTON, VA 22202

EXAMINER

WITZ, JEAN C

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 12/17/2002

7

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/754,347

Applicant(s)

GELBER ET AL.

Examiner

Jean C. Witz

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 September 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-106 is/are pending in the application.
- 4a) Of the above claim(s) 7,9-49,60 and 62-102 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6,8,50-59,61 and 103-106 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Claim Objections

The numbering of claims is not in accordance with 37 CFR 1.126 which requires consecutive numbering of the claims to be preserved throughout the prosecution. Originally presented claims did not contain a claim numbered 86. Misnumbered claims 87-107 been renumbered 86-106. All references to claims in the instant office action will refer to renumbered claims. Applicants are directed to refer in future office actions to claims as renumbered.

Election/Restrictions

Applicant's election without traverse of the species of anti-inflammatory nutraceutical and the species of stinging nettle as the anti-inflammatory nutraceutical in Paper No. 6 is acknowledged. The claims covered by this election include the generic claims 1-6 and 54-59 and claims 8, 50-53, 61 and 103-106.

Claims 14, 16, 30, 31, 67, 69, 83, and 84, although they contain reference to an anti-inflammatory nutraceutical, are members of a non-elected species and their inclusion with the elected species would require search of the entire species to which they belong. Therefore, these claims have not been included in the elected species and are deemed non-elected and withdrawn from consideration. Applicants' position that claims 4-5 and 57-58 are generic is persuasive and these claims have been included as generic.

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Claims 7, 9-49, 60, and 62-102 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 6, 8, 50-5-7, 59, 61, 103-106 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Martin (3,457,345).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to

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consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 3, 5, 56 and 58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin (3,457,345) in view of any of Wiersma (5,948,414), Hamel et al. (4,662,880), Ayer et al. (4,810,502) or Weinstein (6,270,796).

The claims recite specific decongestant compounds. Martin discloses a composition for treatment of upper respiratory disorders including the common cold. Martin teaches a composition containing bromelain, 1-phenylephrine hydrochloride (a decongestant) and pyrilamine maleate (an anti-histamine). The secondary references all disclose multiple variations and combinations of conventional anti-histamines and conventional decongestants for treatment of rhinitis from allergies and colds. Replacement of one well known and effective decongestant and/or antihistamine with another well known and effective decongestant and/or antihistamine as recited in the cited claims, absent objective evidence of surprising or unexpected result is deemed well within the practitioner and would have been obvious to one of ordinary skill in the art at the time the invention was made with the reasonable expectation of obtaining a composition that performs the same function in the same manner as that disclosed by Martin.

Claims 1-6, 8, 50-59, 61, 103-106 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wiersma (5,948,414), Hamel et al. (4,662,880), Ayer et al. (4,810,502) and Weinstein (6,270,796) combined with Armstrong et al. (6,255,294).

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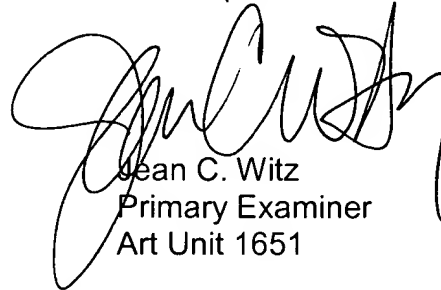
The primary references all disclose multiple variations and combinations of conventional anti-histamines and conventional decongestants for treatment of rhinitis from allergies and colds. Armstrong et al. discloses that stinging nettle is conventionally included in a composition for treatment of allergies. See col. 4, lines 43-48. It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine stinging nettle with other conventional allergy treating drugs including other antihistamines as well as conventional decongestants. "It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jean C. Witz whose telephone number is (703) 308-3073. The examiner can normally be reached on 6:30 a.m. to 4:00 p.m. M-Th and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.



Jean C. Witz
Primary Examiner
Art Unit 1651

December 13, 2002